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FREEDOM OF SPEECH IN WAR TIME

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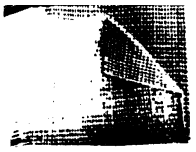

FREEDOM OF SPEECH IN WAR TIME

NEVER in the history of our country, since the Alien and Sedition Laws of 1798, has the meaning of free speech been the subject of such sharp controversy as to-day.[1] Over two hundred

[1] BIBLIOGRAPHICAL NOTE. — Important decisions under the Federal Espionage Act are printed in the various Federal and United States Supreme Court reports; the BULLETINS OF THE DEPARTMENT OF JUSTICE ON THE INTERPRETATION OF WAR STATUTES (cited hereafter as BULL. DEPT. JUST.) contain many *nisi prius* rulings and charges not otherwise reported. The cases before July, 1918, have been collected by Walter Nelles in a pamphlet, ESPIONAGE ACT CASES, *with certain others on related points*, published by the National Liberties Bureau, New York. This has some state cases and gives a careful analysis of the decisions. The Bureau has also published WAR-TIME PROSECUTIONS AND MOB VIOLENCE, *involving the rights of free speech, free press, and peaceful assemblage (from April 1, 1917, to March 1, 1919)*, containing an annotated list of prosecutions, convictions, exclusions from the mail, etc.; and "The Law of the Debs Case" (leaflet). Mr. Nelles has submitted to Attorney General Palmer "A Memorandum concerning Political Prisoners within the Jurisdiction of the Department of Justice in 1919" (MS. copy owned by the Harvard Law School Library).

The enforcement of the Espionage Act and similar statutes is officially summarized in the REPORTS OF THE ATTORNEY GENERAL for 1917 (page 75) and 1918 (pages 17, 20–23, 47–57). A list of prosecutions is given with the results. See, also, Atty. Gen. Gregory's Suggestions to the Executive Committee of the American Bar Association, 4 AM. BAR ASSOC. JOURN. 305 (1918).

The best discussion of the legal meaning of "Freedom of the Press in the United States" will be found in an article under that name by Henry Schofield, in 9 PUBLICATIONS OF THE AMERICAN SOCIOLOGICAL SOCIETY, 67 (1914). This volume is devoted entirely to "Freedom of Communication," and contains several valuable papers on different aspects of the problem. Other legal articles not dealing with the situation in war are: "The Jurisdiction of the United States over Seditious Libel," H. W. Biklé, 41 AM. L. REG. (N. S.) 1 (1902); "Restrictions on the Freedom of the Press," 16 HARV. L. REV. 55 (1902); "Free Speech and Free Press in Relation to the Police Power of the State," P. L. Edwards, 58 CENT. L. J. 383 (1904); "Federal Interference with the Freedom of the Press," Lindsay Rogers, 23 YALE L. J. 559 (1914), substantially reprinted as Chapter IV of his POSTAL POWER OF CONGRESS, Baltimore, Johns Hopkins Press, 1916; A. V. DICEY, THE LAW OF THE CONSTITUTION, 8 ed., Chap. VI; "Freedom of Speech and of the Press," 65 UNIV. OF PA. L. REV. 170 (1916); Joseph R. Long, "The Freedom of the Press," 5 VA. L. REV. 225 (1918). Freedom of speech is discussed by Dean Pound as an interest of the individual in his "Interests of Personality," 28 HARV. L. REV. 445, 453 (1915); and as an alleged bar to injunctions of libel in his "Equitable Relief against Defamation and Injuries to Personality," 29 HARV. L. REV. 640, 648 (1916).

The situation in war is specifically treated in the following: "Freedom of Speech and of the Press," W. R. Vance, 2 MINN. L. REV. 239 (1918); "The Espionage Act

prosecutions and other judicial proceedings during the war, involving speeches, newspaper articles, pamphlets, and books, have been followed since the armistice by a widespread legislative consideration of bills punishing the advocacy of extreme radicalism. It is becoming increasingly important to determine the true limits of freedom of expression, so that speakers and writers may know how much they can properly say, and governments may be sure how much they can lawfully and wisely suppress. The United States Supreme Court has recently handed down several decisions upon the Espionage Act,[2] which put us in a much better position than

Cases," 32 HARV. L. REV. 417 (1919); "Threats to take the Life of the President," 32 HARV. L. REV. 724 (1919); "The Vital Importance of a Liberal Construction of the Espionage Act," Alexander H. Robbins, 87 CENT. L. J. 145 (1918); "Sufficiency of Indictments under the Espionage Act," 87 CENT. L. J. 400 (1918). The Espionage Act is one of the topics covered by Judge Charles M. Hough, "Law in War Time — 1917," 31 HARV. L. REV. 692, 696 (1918). The issues involved in the current decisions are presented in nontechnical form by these articles: "Freedom of Speech," Z. Chafee, Jr., 17 NEW REPUBLIC, 66 (November 16, 1918); "The Debs Case and Freedom of Speech," Ernst Freund, 19 NEW REPUBLIC, 13 (May 3, 1919); 19 *ib.* 151 (May 31). William Hard, "Mr. Burleson, Espionagent," 19 NEW REPUBLIC, 42 (May 10, 1919), and "Mr. Burleson, Section 481½ B," 19 NEW REPUBLIC, 76 (May 17, 1919), reviews exclusions from the mails. "The Trial of Eugene Debs," Max Eastman, THE LIBERATOR (November, 1918), gives a defendant's impression of the operation of the act.

The history of freedom of speech in America has not yet been fully investigated, but CLYDE A. DUNIWAY, THE DEVELOPMENT OF FREEDOM OF THE PRESS IN MASSACHUSETTS, Cambridge, Harvard University Press, 1906, is extremely useful. Much light is thrown on the problem by sedition trials in England, before our Revolution and during the French Revolution. The best account of these is in ERSKINE MAY, 2 CONSTITUTIONAL HISTORY OF ENGLAND, 2 ed., 1912, Chaps. IX–X, summarized by Charles A. Beard in 16 NEW REPUBLIC, 350 (October 19, 1918). See, also, 2 STEPHEN, HISTORY OF THE CRIMINAL LAW, Chap. XXIV; and G. O. TREVELYAN, THE EARLY HISTORY OF CHARLES JAMES FOX, for the Wilkes and Junius controversies.

The legal meaning of freedom of speech cannot properly be determined without a knowledge of the political and philosophical basis of such freedom. Four writings on this problem may be mentioned as invaluable: PLATO'S APOLOGY OF SOCRATES; MILTON'S AREOPAGITICA; the second chapter of MILL ON LIBERTY; and Walter Bagehot's essay, "The Metaphysical Basis of Toleration." The second chapter of J. F. STEPHEN, LIBERTY, EQUALITY, FRATERNITY, has an important critique on Mill. See, also, J. B. BURY, A HISTORY OF FREEDOM OF THOUGHT, the first and last chapters; GROTE, PLATO, Chap. VI; GRAHAM WALLAS, THE GREAT SOCIETY, 195–98; H. J. LASKI, AUTHORITY IN THE MODERN STATE, *passim*. For a caustic point of view, see Fabian Franklin, "Some Free Speech Delusions," 2 UNPOPULAR REV. 223 (October, 1914). The proper course in war is discussed by Ralph Barton Perry in a book review, 7 YALE REV. 670 (April, 1918). The difficulties of the problem as seen from actual experience on both sides are presented in VISCOUNT MORLEY'S RECOLLECTIONS.

[2] Schenck *v.* United States, 249 U. S. 47, 39 Sup. Ct. Rep. 247, BULL. DEPT. JUST., No. 194 (1919), is the leading case. See, also, Frohwerk *v.* United States, 249 U. S. 204,

formerly to discuss the war-time aspects of the general problem of liberty of speech, and this article will approach the general problem from that side. At some later day it may be possible to discuss the proper limits of radical agitation in peace, and also to make a detailed historical examination of the events and documents leading up to the free speech clauses in our state and federal constitutions. For the present it is not feasible to do more than consider the application of those clauses to the treatment of opposition to war.

We shall not, however, confine ourselves to the question whether a given form of federal or state action against pacifist and similar utterances is void under the constitutions. It is often assumed that so long as a statute is held valid under the Bill of Rights, that document ceases to be of any importance in the matter, and may be henceforth disregarded. On the contrary, a provision like the First Amendment to the federal Constitution,

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of their grievances,"

is much more than an order to Congress not to cross the boundary which marks the extreme limits of lawful suppression. It is also an exhortation and a guide for the action of Congress inside that boundary. It is a declaration of national policy in favor of the public discussion of all public questions. Such a declaration should make Congress reluctant and careful in the enactment of all restrictions upon utterance, even though the courts will not refuse to enforce them as unconstitutional. It should influence the judges in their construction of valid speech statutes, and the prosecuting attorneys who control their enforcement. The Bill of Rights in a European constitution is a declaration of policies and nothing more, for the courts cannot disregard the legislative will though it violates the constitution.[3] Our Bills of Rights perform a double

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39 Sup. Ct. Rep. 249, BULL. DEPT. JUST., No. 197 (1919); Debs *v.* United States, 249 U. S. 211, 39 Sup. Ct. Rep. 252, BULL. DEPT. JUST., No. 196 (1919); Sugarman *v.* United States, 249 U. S. 182, 39 Sup. Ct. Rep. 191, BULL. DEPT. JUST., No. 195 (1919).

[3] A. V. DICEY, LAW OF THE CONSTITUTION, 8 ed., 130: "This curious result therefore ensues. The restrictions placed on the action of the legislature under the French constitution are not in reality laws, since they are not rules which in the last resort

function. They fix a certain point to halt the government abruptly with a "Thus far and no farther"; but long before that point is reached they urge upon every official of the three branches of the state a constant regard for certain declared fundamental policies of American life.[4]

Our main task, therefore, is to ascertain the nature and scope of the policy which finds expression in the First Amendment to the United States Constitution and the similar clauses of all the state constitutions,[5] and then to determine the place of that policy in the conduct of war, and particularly the war with Germany. The free speech controversy of the last two years has chiefly gathered about the federal Espionage Act. This Act contains a variety of provisions on different subjects, such as the protection of ships in harbors, spy activities, unlawful military expeditions, etc., but the portion which concerns us is the third section of Title I.[6] As originally enacted on June 15, 1917, this section established three new offenses: (1) false statements or reports interfering with military or naval operations or promoting the success of our enemies; (2) causing or attempting to cause insubordination, disloyalty, mutiny or refusal of duty in the military and naval forces; (3) obstruction of enlistments and recruiting. Attorney General Gregory reports that, although this Act proved an effective instrumentality against deliberate or organized disloyal propaganda, it did not reach the individual, casual, or impulsive disloyal utterances. Also some District Courts gave what he considered a narrow con-

will be enforced by the Courts. Their true character is that of maxims of political morality, which derive whatever strength they possess from being formally inscribed in the constitution and from the resulting support of public opinion. What is true of the constitution of France applies with more or less force to other polities which have been formed under the influence of French ideas."

[4] "No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows." J. B. THAYER, LEGAL ESSAYS, 38. See his quotation from 1 BRYCE, AMERICAN COMMONWEALTH, 1 ed., 377.

[5] Massachusetts, New Hampshire, Vermont, North and South Carolina retain a short clause like the federal Constitution. The other states follow the New York form: NEW YORK CONSTITUTION, 1822, Art. 7, § 8. "Every citizen may freely speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that right; and no law shall be passed, to restrain, or abridge the liberty of speech, or of the press." See Schofield in 9 PROC. AM. SOCIOLOG. SOC. 95.

[6] Act of June 15, 1917, c. 30, tit. 1, § 3; 40 STAT. AT. L. 217, 219; COMP. STAT. 1918, § 10212c amended by Act of May 16, 1918, c. 75. The full text of the original and amended sections will be found in notes 91 and 131, *infra*.

struction of the word "obstruct" in clause (3), so that as he puts it, "most of the teeth which we tried to put in were taken out." [7]

"These individual disloyal utterances, however, occurring with considerable frequency throughout the country, naturally irritated and angered the communities in which they occurred, resulting sometimes in unfortunate violence and lawlessness and everywhere in dissatisfaction with the inadequacy of the Federal law to reach such cases. Consequently there was a popular demand for such an amendment as would cover these cases." [8]

On May 16, 1918, Congress amended the Espionage Act by what is sometimes called the Sedition Act, adding nine more offenses to the original three, as follows: (4) saying or doing anything with intent to obstruct the sale of United States bonds, except by way of bona fide and not disloyal advice; (5) uttering, printing, writing, or publishing any disloyal, profane, scurrilous, or abusive language, or language intended to cause contempt, scorn, contumely or disrepute as regards the form of government of the United States; (6) or the Constitution; (7) or the flag; (8) or the uniform of the Army or Navy; (9) or any language intended to incite resistance to the United States or promote the cause of its enemies; (10) urging any curtailment of production of any things necessary to the prosecution of the war with intent to hinder its prosecution; (11) advocating, teaching, defending, or suggesting the doing of any of these acts; and (12) words or acts supporting or favoring the cause of any country at war with us, or opposing the cause of the United States therein. Whoever commits any one of these offenses in this or any future war is liable to a maximum penalty of $10,000 fine or twenty years' imprisonment, or both.

This statute has been enacted and vigorously enforced under a constitution which provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

Clearly, the problem of the limits of freedom of speech in war time is no academic question. On the one side, thoughtful men and journals are asking how scores of citizens can be imprisoned under this constitution only for their disapproval of the war as irreligious, unwise, or unjust. On the other, federal and state officials point

[7] 4 AM. BAR ASSOC. JOURN. 306.

[8] REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES (1918), 18.

to the great activities of German agents in our midst and to the unprecedented extension of the business of war over the whole nation, so that in the familiar remark of Ludendorff, wars are no longer won by armies in the field, but by the *morale* of the whole people. The widespread Liberty Bond campaigns, and the shipyards, munition factories, government offices, training camps, in all parts of the country, are felt to make the entire United States a theater of war, in which attacks upon our cause are as dangerous and unjustified as if made among the soldiers in the rear trenches. The government regards it as inconceivable that the Constitution should cripple its efforts to maintain public safety. Abstaining from countercharges of disloyalty and tyranny, let us recognize the issue as a conflict between two vital principles, and endeavor to find the basis of reconciliation between order and freedom.

At the outset, we can reject two extreme views in the controversy. First, there is the view that the Bill of Rights is a peace-time document and consequently freedom of speech may be ignored in war. This view has been officially repudiated.[9] At the opposite pole is the belief of many agitators that the First Amendment renders unconstitutional any Act of Congress without exception "abridging the freedom of speech, or of the press," that all speech is free, and only action can be restrained and punished. This view is equally untenable. The provisions of the Bill of Rights cannot be applied with absolute literalness but are subject to exceptions.[10] For instance, the prohibition of involuntary servitude in the Thirteenth Amendment does not prevent military conscription,[11] or the enforcement of a "work or fight" statute.[12] The difficulty, of course, is to define the principle on which the implied exceptions are based, and an effort to that end will be made subsequently.

Since it is plain that the true solution lies between these two extreme views, and that even in war time freedom of speech exists

[9] REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES (1918), 20: "This department throughout the war has proceeded upon the general principle that the constitutional right of free speech, free assembly, and petition exist in war time as in peace time, and that the right of discussion of governmental policy and the right of political agitation are most fundamental rights in a democracy."

[10] Robertson *v.* Baldwin, 165 U. S. 275, 281 (1897).

[11] Selective Draft Law Cases, 245 U. S. 366, 390 (1918); Claudius *v.* Davie, 175 Cal. 208 (1917).

[12] State *v.* McClure, 105 Atl. 712 (DEL. GEN. SESS., 1919).

subject to a problematical limit, it is necessary to determine where the line runs between utterance which is protected by the Constitution from governmental control and that which is not. Many attempts at a legal definition of that line have been made,[13] but two mutually inconsistent theories have been especially successful in winning judicial acceptance, and frequently appear in the Espionage Act cases.

One theory construes the First Amendment as enacting Blackstone's statement that "the liberty of the press . . . consists in laying no *previous* restraints upon publications and not in freedom from censure for criminal matter when published." [14] The line where legitimate suppression begins is fixed chronologically at the time of publication. The government cannot interfere by a censorship or injunction *before* the words are spoken or printed, but can punish them as much as it pleases *after* publication, no matter how harmless or essential to the public welfare the discussion may be. This Blackstonian definition found favor with Lord Mansfield,[15] and is sometimes urged as a reason why libels should not be enjoined.[16] It was adopted by American judges in several early prosecutions for libel,[17] one of which was in Massachusetts,[18] whence Justice Holmes carried it into the United States Supreme Court.[19] Fortunately he has now repudiated this interpretation of freedom of speech,[20] but not until his dictum had had considerable influence, particularly in Espionage Act cases.[21] Of course if the First Amend-

[13] See a discussion by Dean Pound of two views besides Blackstone's in 29 HARV. L. REV. 640, 651. The view mentioned as Story's is really that of St. George Tucker, whom Story was criticising. 2 STORY, CONSTITUTION, § 1886.

[14] 4 BLACKSTONE, COMMENTARIES, 151.

[15] King *v.* Dean of St. Asaph, 3 T. R. 428, 431 (1789): "The liberty of the press consists in printing without any previous licence, subject to the consequence of law."

[16] See Roscoe Pound, "Equitable Relief against Defamation and Injuries to Personality," 29 HARV. L. REV. 651. Recent Federal cases are American Malting Co. *v.* Keitel, 209 Fed. 351 (C. C. A. 2d, 1913); Willis *v.* O'Connell, 231 Fed. 1004 (S. D. Ala. 1916).

[17] Respublica *v.* Oswald, 1 Dall. (U. S.) 319, 325 (Pa., 1788), McKean, J.; Trial of William Cobbett, for Libel, WHARTON'S STATE TRIALS, 322, 323 (Pa., 1797), McKean, J.; Respublica *v.* Dennie, 4 Yeates (Pa.) 267, 269 (1805). See Schofield in 9 PROC. AM. SOCIOL. SOC. 69.

[18] Commonwealth *v.* Blanding, 3 Pick. (Mass.) 304, 313 (1825).

[19] Patterson *v.* Colorado, 205 U. S. 454, 462 (1907).

[20] Schenck *v.* United States, 249 U. S. 47, 39 Sup. Ct. Rep. 247, 249 (1919).

[21] Masses Pub. Co. *v.* Patten, 246 Fed. 24, 27 (C. C. A. 2d, 1917); United States *v.* Coldwell, BULL. DEPT. JUST., No. 158 (D. C. R. I.) 4.

ment does not prevent prosecution and punishment of utterances, the Espionage Act is unquestionably constitutional.

This Blackstonian theory dies hard, but has no excuse for longer life. In the first place, Blackstone was not interpreting a constitution but trying to state the English law of his time, which had no censorship and did have extensive libel prosecutions. Whether or not he stated that law correctly, an entirely different view of the liberty of the press was soon afterwards enacted in Fox's Libel Act,[22] so that Blackstone's view does not even correspond to the English law of the last hundred and twenty-five years. Furthermore, Blackstone is notoriously unfitted to be an authority on the liberties of American colonists, since he upheld the right of Parliament to tax them,[23] and was pronounced by one of his own colleagues to have been "we all know, an anti-republican lawyer." [24]

Not only is the Blackstonian interpretation of our free speech clauses inconsistent with eighteenth-century history, soon to be considered, but it is contrary to modern decisions, thoroughly artificial, and wholly out of accord with a common-sense view of the relations of state and citizen. In some respects this theory goes altogether too far in restricting state action. The prohibition of previous restraint would not allow the government to prevent a newspaper from publishing the sailing dates of transports or the number of troops in a sector. It would render illegal removal of an indecent poster from a billboard or the censorship of moving pictures before exhibition, which has been held valid under a free speech clause.[25] And whatever else may be thought of the decision under the Espionage Act with the unfortunate title, *United States* v. *The Spirit of '76*,[26] it was clearly previous restraint for a federal court to direct the seizure of a film which depicted the Wyoming Massacre and Paul Revere's Ride, because it was "calculated reasonably so to excite or inflame the passions of our people or some of them as that they will be deterred from giving that full measure of cooperation, sympathy, assistance; and sacrifice which is due to

[22] 32 GEO. III, c. 60 (1792). See page 948, *infra*.

[23] 1 BLACKSTONE, COMMENTARIES, 109.

[24] Willes, J., in Dean of St. Asaph's Case, 4 Doug. 73, 172 (1784), quoted by Schofield, 9 PROC. AM. SOCIOL. SOC. 85, note.

[25] Mutual Film Corporation *v.* Industrial Commission of Ohio, 236 U. S. 230, 241 (1915).

[26] BULL. DEPT. JUST., No. 53 (D. C. S. D. Cal., 1917), Bledsoe, J.

Great Britain, as an ally of ours," and "to make us a little bit slack in our loyalty to Great Britain in this great catastrophe."

On the other hand it is hardly necessary to argue that the Blackstonian definition gives very inadequate protection to the freedom of expression. A death penalty for writing about socialism would be as effective suppression as a censorship.[27] Cooley's comment on Blackstone is unanswerable:[28]

. . . "The mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications, . . . Their purpose [of the free-speech clauses] has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. . . . The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."

If we turn from principles to precedents, we find several decisions which declare the constitutional guarantee of free speech to be violated by statutes and other governmental action which imposed no previous restraint but penalized publications after they were made.[29] And most of the decisions in which a particular statute

[27] "Free speech, like every form of freedom, goes in danger of its life in war time. The other day in Russia an Englishman came on a street-meeting shortly after the first revolution had begun. An extremist was addressing the gathering and telling them that they were fools to go on fighting, that they ought to refuse and go home, and so forth. The crowd grew angry, and some soldiers were for making a rush at him; but the chairman, a big burly peasant, stopped them with these words: 'Brothers, you know that our country is now a country of free speech. We must listen to this man, we must let him say anything he will. But, brothers, when he's finished, we'll bash his head in!'" John Galsworthy, "American and Briton," 8 YALE REV. 27 (October, 1918).

[28] COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 603, 604.

[29] Louthan *v.* Commonwealth, 79 Va. 196 (1884) — statute punishing school superintendent for political speeches; Atchison, etc. Ry. *v.* Brown, 80 Kans. 312, 102 Pac.

punishing for talking or writing is sustained do not rest upon the Blackstonian interpretation of liberty of speech,[30] but upon another theory, now to be considered. Therefore, it is possible that Title I, section 3, of the Espionage Act, violates the First Amendment, although it does not interfere with utterances before publication.[31]

A second interpretation of the freedom of speech clauses limits them to the protection of the use of utterance and not to its "abuse." It draws the line between "liberty" and "license." Chief Justice White [32] rejects

"the contention that the freedom of the press is the freedom to do wrong with impunity and implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends. . . . However complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrong-doing."

A statement of the same view in another peace case is made by Judge Hamersley of Connecticut: [33]

"Every citizen has an equal right to use his mental endowments, as well as his property, in any harmless occupation or manner; but he has

459 (1909) — service-letter statute, making employer liable to civil action if he failed to furnish a discharged employee a written statement for the true reason for discharge. St. Louis, etc. Ry. Co. *v.* Griffin, 106 Texas 477, 171 S. W. 703 (1914), same; Wallace *v.* Georgia Ry. Co., 94 Ga. 732, 22 S. E. 579 (1894), same; *Ex parte* Harrison, 212 Mo. 88, 110 S. W. 709 (1908), — statute punishing voters' leagues for commenting on candidates for office without disclosing the names of all persons furnishing the information; State *ex rel.* Metcalf *v.* District Court, 52 Mont. 46, 155 Pac. 278 (1916) — contempt proceedings for criticism of judge for past decision; State *ex rel.* Ragan *v.* Junkin, 85 Neb. 1, 122 N. W. 473 (1909), — statute invalidating nomination of candidates by conventions or any other method except primaries; State *v.* Pierce, 163 Wis. 615, 158 N. W. 696 (1916) — corrupt practices act punishing political disbursements outside one's own county except through a campaign committee. Some of these decisions are open to dispute on the desirability of the statutes, and some are opposed by other cases for that reason, but in their repudiation of the Blackstonian test they furnish unquestioned authority.

[30] Examples in such cases of express repudiation of the Blackstonian doctrine are found in Schenck *v.* United States, 249 U. S. 47, 39 Sup. Ct. Rep. 247 (1919); State *v.* McKee, 73 Conn. 18, 46 Atl. 409 (1900); State *v.* Pioneer Press Co., 100 Minn. 173, 110 N. W. 867 (1907); Cowan *v.* Fairbrother, 118 N. C. 406, 418 (1896).

[31] Title XII of the Espionage Act does impose previous restraint on publications which violate the Act by authorizing the Postmaster-General to exclude them from the mails. See page 961, *infra*.

[32] Toledo Newspaper Co. *v.* United States, 247 U. S. 402, 419 (1918).

[33] State *v.* McKee, 73 Conn. 18, 28, 46 Atl. 409 (1900).

no right to use them so as to injure his fellow-citizens or to endanger the vital interests of society. Immunity in the mischievous use is as inconsistent with civil liberty as prohibition of the harmless use. . . . The liberty protected is not the right to perpetrate acts of licentiousness, or any act inconsistent with the peace or safety of the State. Freedom of speech and press does not include the abuse of the power of tongue or pen, any more than freedom of other action includes an injurious use of one's occupation, business, or property."

The decisions in the war are full of similar language.[34]

Practically the same view is adopted by Cooley,[35] that the clauses guard against repressive measures by the several departments of government, but not against utterances which are a public offense, or which injure the reputation of individuals.

"We understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards we must look to the common-law rules which were in force when the constitutional guaranties were established, and in reference to which they have been adopted."

To a judge obliged to decide whether honest and able opposition to the continuation of a war is punishable, these generalizations furnish as much help as a woman forced, like Isabella in "Measure for Measure," to choose between her brother's death and loss of honor, might obtain from the pious maxim, "Do right." What is abuse? What is license? What standards does the law afford?

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[34] Mayer, J., in United States *v.* Phillips, BULL. DEPT. JUST., No. 14 (S. D. N. Y., 1917), 5: "In this country it is one of our foundation stones of liberty that we may freely discuss anything we please, provided that that discussion is in conformity with law, or at least not in violation of it." Mayer, J., in United States *v.* Goldman, BULL. DEPT. JUST., No. 41 (S. D. N. Y., 1917), 2: "No American worthy of the name believes in anything else than free speech; but free speech means, not license, not counseling disobedience of the law. Free speech means that frank, free, full, and orderly expression which every man or woman in the land, citizen or alien, may engage in, in lawful and orderly fashion." Van Valkenburgh, J., in United States *v.* Stokes, BULL. DEPT. JUST., No. 106 (W. D. Mo., 1918), 12: "No one is permitted under the constitutional guaranties to commit a wrong or violate the law." See also United States *v.* Pierce, BULL. DEPT. JUST., No. 52 (S. D. N. Y., 1917), 22, Ray, J.; United States *v.* Nearing, BULL. DEPT. JUST., No. 192 (S. D. N. Y., 1917), 4, Mayer, J.

[35] COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 605; quoted by Hough, J., in Fraina *v.* United States, 255 Fed. 28, 35 (C. C. A. 2d, 1918).

To argue that the federal Constitution does not prevent punishment for criminal utterances begs the whole question, for utterances within its protection are not crimes. If it only safeguarded lawful speech, Congress could escape its operation at any time by making any class of speech unlawful. Suppose, for example, that Congress declared any criticism of the particular administration in office to be a felony, punishable by ten years' imprisonment. Clearly, the Constitution must limit the power of Congress to create crimes. But how far does that limitation go? Cooley suggests that the legislative power extends only to speech which was criminal or tortious at common law in 1791. No doubt, conditions then must be considered, but must the legislature leave them unchanged for all time? Moreover, the few reported American cases before 1791 prove that our common law of sedition was exactly like that of England, and it would be extraordinary if the First Amendment enacted the English sedition law of that time, which was repudiated by every American and every liberal Englishman, and altered by Parliament itself in the very next year, 1792.[36] Clearly, we must look further and find a rational test of what is use and what is abuse. Saying that the line lies between them gets us nowhere. And "license" is too often "liberty" to the speaker, and what happens to be anathema to the judge.

We can, of course, be sure that certain forms of utterance, which have always been crimes or torts at common law, are not within the scope of the free speech clauses. The courts in construing such clauses have, for the most part, done little more than place obvious cases on this or that side of the line. They tell us, for instance, that libel and slander are actionable, or even punishable, that indecent books are criminal, that it is contempt to interfere with pending judicial proceedings, and that a permit can be required for street meetings; and on the other hand, that some criticism of the government must be allowed, that a temperate examination of a judge's opinion is not contempt, and that honest discussion of the merits of a painting causes no liability for damages. But when we ask where the line actually runs and how they know on which side of it a given utterance belongs, we find no answer in their opinions. Justice Holmes in his Espionage Act decisions had a magnificent

[36] 2 MAY, CONSTITUTIONAL HISTORY OF ENGLAND, Chap. IX; 2 STEPHEN, HISTORY OF THE CRIMINAL LAW, Chap. XXIV.

opportunity to make articulate for us that major premise, under which judges ought to classify words as inside or outside the scope of the First Amendment. He, we hoped, would concentrate his great abilities on fixing the line. Instead, like the other judges, he has told us that certain plainly unlawful utterances are, to be sure, unlawful.

"The First Amendment . . . obviously was not intended to give immunity for every possible use of language. . . . We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder . . . would be an unconstitutional interference with free speech."[37]

"The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[38]

How about the man who gets up in a theater between the acts and informs the audience honestly but perhaps mistakenly that the fire exits are too few or locked? He is a much closer parallel to Schenck or Debs. How about James Russell Lowell when he counseled, not murder, but the cessation of murder, his name for war? The question whether such perplexing cases are within the First Amendment or not cannot be solved by the multiplication of obvious examples, but only by the development of a rational principle to mark the limits of constitutional protection.

"The gradual process of judicial inclusion and exclusion,"[39] which has served so well to define other clauses in the federal Constitution by blocking out concrete situations on each side of the line until the line itself becomes increasingly plain, has as yet been of very little use for the First Amendment. The cases are too few, too varied in their character, and often too easily solved, to develop any definite boundary between lawful and unlawful speech. Even if some boundary between the precedents could be attained, we could have little confidence in it unless we knew better than now the fundamental principle on which the classification was based. Indeed, many of the decisions in which statutes have been held to violate free speech seem to ignore so seriously the economic and political facts of our time, that they are precedents of very dubious

[37] Frohwerk *v.* United States, 249 U. S. 204, 39 Sup. Ct. Rep. 249, 250 (1919).
[38] Schenck *v.* United States, 249 U. S. 47, 39 Sup. Ct. Rep. 247 (1919).
[39] Miller, J., in Davidson *v.* New Orleans, 96 U. S. 97, 104 (1877).

value for the inclusion and exclusion process.[40] Nearly every free speech decision, outside such hotly litigated portions as privilege and fair comment in defamation, appears to have been decided largely by intuition.

Fortunately Justice Holmes has not left us without some valuable suggestions pointing toward the ultimate solution of the problem of the limits of free speech,[41] and still others are contained in Judge Learned Hand's opinion in *Masses* v. *Patten*.[42] To these we shall soon return. For the moment, however, it may be worth while to forsake the purely judicial discussion of free speech, and obtain light upon its meaning from the history of the constitutional clauses and from the purpose free speech serves in social and political life.

If we apply Coke's test of statutory construction, and consider what mischief in the existing law the framers of the First Amendment wished to remedy by a new safeguard, we can be sure that it was not the censorship. This had expired in England in 1695,[43] and in the colonies by 1725.[44] For years the government here and in England had substituted for the censorship rigorous and repeated prosecutions for criminal libel or seditious libel, as it was often called, which were directed against political discussion, and for years these prosecutions were opposed by liberal opinion and popular agitation. Primarily the controversy raged around two legal contentions of the great advocates for the defense, such as Erskine and Andrew Hamilton. They argued, first, that the jury and not the judge ought to decide the libellous nature of the writing, and secondly, that the truth of the charge ought to prevent conviction. The real issue, however, lay much deeper. Two different views of the relation of rulers and people were in conflict.[45] According to one view, the rulers were the superiors of the people, and therefore must not be subjected to any censure that would tend to diminish their authority. The people could not make adverse criticism in newspapers or pamphlets, but only through their lawful representatives in the legislature, who might be petitioned in an orderly manner. According to the other view, the rulers are agents and

[40] See note 29, *supra*.

[41] Schenck *v.* United States, 249 U. S. 47, 39 Sup. Ct. Rep. 247, 249 (1919).

[42] 244 Fed. 535 (S. D. N. Y., 1917); reversed in 246 Fed. 24 (C. C. A. 2d., 1917).

[43] MACAULAY, HISTORY OF ENGLAND, Chap. XIX.

[44] C. A. DUNIWAY, FREEDOM OF SPEECH IN MASSACHUSETTS, 89, note.

[45] 2 STEPHEN, HISTORY OF THE CRIMINAL LAW, 299.

servants of the people, who may therefore find fault with their servants and discuss questions of their punishment or dismissal.

Under the first view, which was officially accepted until the close of the eighteenth century, developed the law of seditious libel. This is defined as "the intentional publication, without lawful excuse or justification, of written blame of any public man, or of the law, or of any institution established by law."[46] There was no need to prove any intention on the part of the defendant to produce disaffection or excite an insurrection. It was enough if he intended to publish the blame, because it was unlawful in him merely to find fault with his masters and betters. Such, in the opinion of the best authorities, was the common law of sedition.[47]

It is obvious that under this law liberty of the press was nothing more than absence of the censorship, as Blackstone said. All through the eighteenth century, however, there existed beside this definite legal meaning of liberty of the press, a definite popular meaning: the right of unrestricted discussion of public affairs. There can be no doubt that this was in a general way what freedom of speech meant to the framers of the Constitution. As Schofield says, "One of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press. . . . Liberty of the press as declared in the First Amendment, and the English common-law crime of sedition, cannot co-exist."[48] I must therefore strongly dissent, as would Professor Schofield, from the conclusion of Dean Vance in a recent article on the Espionage Act, that the founders of our government merely intended by the First Amendment "to limit the new government's statutory powers to penalize utterances as seditious, to those which were seditious under the then accepted common-law rule."[49] The founders had seen seventy English prosecutions for libel since 1760, and fifty convictions under that common-law rule, which made conviction easy.[50] That rule had been detested in this country ever since it was repudiated by jury and populace in the famous trial of Peter Zenger,

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[46] 2 STEPHEN, HISTORY OF THE CRIMINAL LAW, 353.

[47] *Ibid.*, 353, and Chap. XXIV, *passim;* Schofield, in 9 PROC. AM. SOCIOL. SOC., 70 *ff.*, gives an excellent summary with especial reference to American conditions.

[48] Schofield, *Ibid.*, 76, 87.

[49] W. R. Vance, in "Freedom of Speech and of the Press," 2 MINN. L. REV. 239, 259.

[50] 2 MAY, CONSTITUTIONAL HISTORY OF ENGLAND, 2 ed., 9, note.

the New York printer, the account of which went through fourteen editions before 1791.[51] Nor was this the only colonial sedition prosecution under the common law, and many more were threatened.[52] The First Amendment was written by men to whom Wilkes and Junius were household words, who intended to wipe out the common law of sedition, and make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible in the United States of America.

It must not be forgotten that the controversy over liberty of the press was a conflict between two views of government, that the law of sedition was a product of the view that the government was master, and that the American Revolution transformed into a working reality the second view that the government was servant, and therefore subjected to blame from its master, the people. Consequently, the words of Sir James Fitzjames Stephen about this second view have a vital application to American law.[53]

"To those who hold this view fully and carry it out to all its consequences there can be no such offence as sedition. There may indeed be breaches of the peace which may destroy or endanger life, limb, or property, and there may be incitements to such offences, but no imaginable censure of the government, *short of a censure which has an immediate tendency to produce such a breach of the peace*, ought to be regarded as criminal."

The repudiation by the Constitutions of the English common law of sedition, which was also the common law of the American colonies,

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[51] 17 How. St. Tr. 675 (1735). The fullest account of Zenger and the trial is given by Livingston Rutherford, John Peter Zenger, New York, 1904. Rutherford's bibliography lists thirteen editions of the account of the trial before 1781. The Harvard Law School Library contains four of these (London, 1738; London, 1752; London, 1765; New York, 1770), and also an undated copy without specified place differing from any listed by Rutherford. See also the life of Zenger's counsel, Andrew Hamilton, by William Henry Loyd, in 1 Great American Lawyers, 1. The close relation between the Zenger trial and the prosecutions under George III in England and America is shown by the quotations on reprints of the trial and the dedication of the 1784 London edition to Erskine.

[52] C. A. Duniway, Freedom of the Press in Massachusetts, 91, 93, 115, 123, 130, and note. In 1767 Chief Justice Hutchinson charged the grand jury on Blackstonian lines, "This Liberty means no more than a Freedom for every Thing to pass from the Press without a License." *Ibid.*, 125.

[53] 2 Stephen, History of the Criminal Law, 300. The italics are mine. See also Schofield, 9 Proc. Am. Sociol. Soc. 75.

has been somewhat obscured by judicial retention of the two technical incidents of the old law after the adoption of the free speech clauses. Many judges, rightly or wrongly, continued to pass on the criminality of the writing and to reject its truth as a defense,[54] until statutes or new constitutional provisions embodying the popular view on these two points were enacted.[55] Doubtless, a jury will protect a popular attack on the government better than a judge, and the admission of truth as a defense lessens the evils of suppression. These changes help to substitute the modern view of rulers for the old view, but they are not essential. Sedition prosecutions went on with shameful severity in England after Fox's Libel Act [56] had given the jury power to determine criminality. The American Sedition Act of 1798,[57] which President Wilson declares to have "cut perilously near the root of freedom of speech and of the press," [58] entrusted criminality to the jury and admitted truth as a defense. On the other hand, freedom of speech might exist without these two technical safeguards. The essential question is not, who is judge of the criminality of an utterance, but what is the test of its criminality. The common law and the Sedition Act of 1798 made the test blame of the government and its officials, because to bring them into disrepute tended to overthrow the state. The real issue in every free-speech controversy is this — whether the state can punish all words which have some tendency, however remote, to bring about acts in violation of law, or only words which directly incite to acts in violation of law.

If words do not become criminal until they have an immediate tendency to produce a breach of the peace, there is no need for a law of sedition, since the ordinary standards of criminal solicitation and attempt apply. Under those standards the words must bring the speaker's unlawful intention reasonably near to success. Such a limited power to punish utterances rarely satisfies the zealous in times of excitement like a war. They realize that all condemnation

[54] DUNIWAY, *supra*, Chap. IX; Commonwealth *v.* Clap, 4 Mass. 163 (1808); Commonwealth *v.* Blanding, 3 Pick. (Mass.) 304 (1825).

[55] Examples are: PA. CONS. 1790, Art. 9, § 7; N. Y. SESSION LAWS, 1805, c. 90; N. Y. CONS., 1822, Art. VII, § 8; MASS. LAWS, 1827, c. 107. See Schofield, *op. cit.*, 95–99.

[56] 32 GEO. III, c. 60 (1792).

[57] 1 STAT. AT L., c. 74, 596, Act of July 14, 1798.

[58] 3 WOODROW WILSON, HISTORY OF THE AMERICAN PEOPLE, 153.

of the war or of conscription may conceivably lead to active resistance or insubordination. Is it not better to kill the serpent in the egg? All writings that have a tendency to hinder the war must be suppressed.

Such has always been the argument of the opponents of free speech. And the most powerful weapon in their hand, since the abolition of the censorship, is this doctrine of indirect causation, under which words can be punished for a supposed bad tendency long before there is any probability that they will break out into unlawful acts. Closely related to it is the doctrine of constructive intent, which regards the intent of the defendant to cause violence as immaterial so long as he intended to write the words, or else presumes the violent intent from the bad tendency of the words on the ground that a man is presumed to intend the consequences of his acts. When rulers are allowed to possess these weapons, they can by the imposition of severe sentences create an *ex post facto* censorship of the press. The transference of that censorship from the judge to the jury is indeed important when the attack on the government which is prosecuted expresses a widespread popular sentiment, but the right to jury trial is of much less value in times of war or threatened disorder when the herd instinct runs strong, if the opinion of the defendant is highly objectionable to the majority of the population, or even to the particular class of men from whom or by whom the jury are drawn.[59] It is worth our frank consideration, whether in a country where the doctrine of indirect causation is recognized by the courts twelve small property holders, who have been through an uninterrupted series of patriotic campaigns and are sufficiently middle-aged to be in no personal danger of compulsory military service, are fitted to decide whether there is a tendency to obstruct the draft in the writings of a pacifist, who also happens to be a socialist and in sympathy with the Russian Revolution.[60]

[59] "Under Charles II. [trial by jury] was a blind and cruel system. During part of the reign of George III. it was, to say the least, quite as severe as the severest judge without a jury could have been. The revolutionary tribunal during the Reign of Terror tried by a jury." 1 STEPHEN, HISTORY OF THE CRIMINAL LAW, 569.

[60] "As to the jury . . . they were about seventy-two years old, worth fifty to sixty thousand dollars, retired from business, from pleasure, and from responsibility for all troubles arising outside of their own family. An investigator for the defense computed the average age of the entire venire of 100 men; it was seventy years. Their average wealth was over $50,000. In the jury finally chosen every man was a retired farmer or

This, however, is perhaps a problem for the psychologist rather than the lawyer.

The manner in which juries in time of excitement may be used to suppress writings in opposition to the government, if bad tendency is recognized as a test of criminality, is illustrated by the numerous British sedition trials during the French Revolution. These were after the passage of Fox's Libel Act. For instance, John Drakard was convicted for printing an article on the shameful amount of flogging in the army, under a charge in which Baron Wood emphasized the formidable foe with whom England was fighting, and the general belief that Napoleon was using the British press to carry out his purpose of securing her downfall.[61]

"It is to be feared, there are in this country many who are endeavoring to aid and assist him in his projects, by crying down the establishment of the country, and breeding hatred against the government. Whether that is the source from whence the paper in question springs, I cannot say, but I advise you to consider whether it has not that tendency. You

a retired merchant, but one, who was a contractor still active. They were none of them native to leisure, however, but men whose faces were bitterly worn and wearied out of all sympathy with a struggle they had individually surmounted." Max Eastman, "The Trial of Eugene Debs," 1 LIBERATOR, No. 9 (November, 1918), 9. This statement is, of course, by a friend of Debs, but if accurate, makes the method of jury selection a serious problem in the prosecution of radicals.

The charge of Mayer, J., in United States *v.* Phillips, BULL. DEPT. JUST., No. 14, was so favorable to the defendant that, I am informed by an eyewitness, an acquittal was generally expected in the court-room, but the defendants were convicted.

Another significant fact in sedition prosecutions is the well-known probability that juries will acquit, after the excitement is over, for words used during the excitement, which are as bad in their tendency as other writings prosecuted and severely punished during the critical period. This was very noticeable during the reign of George III. It is also interesting to find two juries in different parts of the country differing as to the criminal character of similar publications or even the same publication. Thus Leigh Hunt was acquitted for writing an article for the printing of which Drakard was convicted. See note 61, *infra*. The acquittal of Scott Nearing and the conviction by the same jury of the American Socialist Society for publishing his book form an interesting parallel. Mayer, J., has decided that there is not such inconsistency in the two verdicts as to warrant a new trial. BULL. DEPT. JUST., No. 198.

[61] 31 HOW. ST. TR. 495, 535 (1811). Leigh Hunt was acquitted for writing the same article. Lord Ellenborough charged, 31 HOW. ST. TR. 367, 408, 413 (1811), "Can you conceive that the exhibition of the words 'One Thousand Lashes,' with strokes underneath to attract attention, could be for any other purpose than to excite disaffection? Could it have any other tendency than that of preventing men from entering into the army?" Compare with these two charges that of Van Valkenburgh, J., in United States *v.* Rose Pastor Stokes, BULL. DEPT. JUST., No. 106 (W. D. Mo., 1917), 985, *infra*.

will consider whether it contains a fair discussion — whether it has not a manifest tendency to create disaffection in the country and prevent men enlisting into the army — whether it does not tend to induce the soldier to desert from the service of his country. And what considerations can be more awful than these? . . .

"The House of Parliament is the proper place for the discussion of subjects of this nature . . . It is said that we have a right to discuss the acts of our legislature. That would be a large permission indeed. Is there, gentlemen, to be a power in the people to counteract the acts of the parliament, and is the libeller to come and make the people dissatisfied with the government under which he lives? This is not to be permitted to any man, — it is unconstitutional and seditious."

The same desire to nip revolution in the bud was shown by the Scotch judges who secured the conviction of Muir and Palmer for advocating reform of the rotten boroughs which chose the House of Commons and the extension of the franchise, sentences of transportation for seven and fourteen years being imposed.[62]

"The right of universal suffrage, the subjects of this country never enjoyed; and were they to enjoy it, they would not long enjoy either liberty or a free constitution. You will, therefore, consider whether telling the people that they have a just right . . . to a total subversion of this constitution, is such a writing as any person is entitled to compose, to print, and to publish."

In the light of such prosecutions it is plain that the most vital indication that the popular definition of liberty of the press, unpunishable criticism of officials and laws, has become a reality, is the disappearance of these doctrines of bad tendency and presumptive intent. In Great Britain they lingered until liberalism triumphed in 1832, but in this country they disappeared with the adoption of the free speech clauses. The French press law no longer recognizes indirect provocation to crime as an offence.[63]

[62] 2 MAY, CONSTITUTIONAL HISTORY, 38–41, on the trials of Muir and Palmer. Fourteen years appears to have been the longest sentence for sedition imposed in Scotland during the French wars. Four years was the longest in England. See note 120, *infra*, for sentences under the Espionage Act.

[63] A. ESMEIN, ÉLÉMENTS DE DROIT CONSTITUTIONNEL, 6 ed. 1145, 1149; Ernst Freund in 19 NEW REPUBLIC 14 (May 3, 1919). The crime of *délit d'opinion* no longer exists. Under the Republic one can lawfully express monarchical opinions and attack the Constitution. Formerly, indirect incitement was unlawful. During the reaction after the assassination of the Duc de Berry, the law allowed *procès de tendance*, by which a newspaper could be suppressed if "*l'esprit résultant d'une succession d'arti-*

The revival of those doctrines is a sure symptom of an attack upon the liberty of the press.

Only once in our history prior to 1917 has an attempt been made to apply those doctrines. In 1798 the impending war with France, the spread of revolutionary doctrines by foreigners in our midst, and the spectacle of the disastrous operation of those doctrines abroad,[64] — facts that have a familiar sound to-day — led to the enactment of the Alien and Sedition Laws.[65] The Alien Law allowed the President to compel the departure of aliens whom he judged dangerous to the peace and safety of the United States, or suspected, on reasonable grounds, of treasonable or secret machinations against our government. The Sedition Law punished false, scandalous, and malicious writings against the government, either House of Congress, or the President, if published with intent to defame any of them, or to excite against them the hatred of the people, or to stir up sedition or to excite resistance of law, or to aid any hostile designs of any foreign nation against the United States. The maximum penalty was a fine of two thousand dollars and two years' imprisonment. Truth was a defense, and the jury had power to determine criminality as under Fox's Libel Act. Despite the inclusion of the two legal rules for which reformers had contended, and the requirement of an actual intention to cause overt injury, the Sedition Act was bitterly resented as invading the liberty of the press. Its constitutionality was assailed on that ground by Jefferson, who pardoned all prisoners when he became President,[66] and popular indignation at the Act and the prosecutions wrecked the Federalist party. In those prosecutions words were once more

cles serait de nature à porter atteinte à la paix publique." — In the same way the New York post-office objected to the general tenor and animus of the Masses as seditious without specifying any particular portion as objectionable, although the periodical offered to excerpt any matter so pointed out. Masses Pub. Co. *v.* Patten, 244 Fed. 535, 536, 543 (1917).

[64] Events leading up to these statutes are narrated in the standard histories and also in FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES, 23.

[65] Act of June 25, 1798, 1 STAT. AT L., 570; Act of July 14, 1798, 1 STAT. AT L., 596.

[66] For references to the Sedition Act in Jefferson's letters, see the edition of PAUL LEICESTER FORD, VII, 245: "The object of that, [the bill] is the suppression of the whig presses; VII, 246; VII, 266, on unconstitutionality; VII, 283, "The alien and sedition laws are working hard;" VII, 289, 311, 336, 350, 354, 355, 356, on popular opposition to the acts; VII, 367, 371, 483, on continuation of Sedition Law by Congress; VIII, 54, 56 *ff.*, 308 *ff.*, on unconstitutionality and pardons; IX, 456, on dismissal of prosecutions.

made punishable for their judicially supposed bad tendency, and the judges reduced the test of intent to a fiction by inferring the bad intent from this bad tendency.[67] Whether or not the Sedition Act was unconstitutional, and on that question Jefferson seems right, it surely defeated the fundamental policy of the First Amendment, the open discussion of public affairs. Like the British trials, the American sedition cases showed, as Professor Schofield demonstrates,[68] "the great danger . . . that men will be fined and imprisoned, under the guise of being punished for their bad motives or bad intent and ends, simply because the powers that be do not agree with their opinions, and spokesmen of minorities may be terrorized and silenced when they are most needed by the community and most useful to it, and when they stand most in need of the protection of the law against a hostile, arrogant majority." When the Democrats got into power, a common-law prosecution for seditious libel was brought in New York against a Federalist who had attacked Jefferson. Hamilton conducted the defense in the name of the liberty of the press.[69] This testimony from Jefferson and Hamilton, the leaders of both parties, leaves the Blackstonian interpretation of free speech in America without a leg to stand on. And the brief attempt of Congress and the Federalist judges to revive the crime of sedition had proved so disastrous that it was not repeated during the next century.

The lesson of the prosecutions for sedition in Great Britain and the United States during this revolutionary period, that the most essential element of free speech is the rejection of bad tendency as the test of a criminal utterance, was never more clearly recognized than in Jefferson's preamble to the Virginia Act for estab-

[67] Schofield, 9 PROC. AM. SOCIOL. SOC. 86. The four reported prosecutions are in WHARTON'S STATE TRIALS, — Lyon, 333 (1798); Cooper, 659 (1800); Haswell, 684 (1800); Callender, 688 (1800).

[68] Schofield, *op. cit.*, 91, and 92, note.

[69] People *v.* Croswell, 3 Johns. Cas. 337 (1804). New York had then no constitutional guarantee of liberty of the press, but Hamilton urged that under that right at common law truth was a defense and the jury could decide on criminality. He defined liberty of the press as "The right to publish, with impunity, truth, with good motives, for justifiable ends though reflecting on government, magistracy, or individuals." See Schofield, *op. cit.*, 89 *ff.*, for criticism of this definition as not in the common law and as too narrow a definition of the conception of free speech. However, it is embodied in many state constitutions and statutes. Two out of four judges agreed with Hamilton.

lishing Religious Freedom.[70] His words about religious liberty hold good of political and speculative freedom, and the portrayal of human life in every form of art.

"To suffer the civil Magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own;"

Although the free speech clauses were directed primarily against the sedition prosecutions of the immediate past, it must not be thought that they would permit unlimited previous restraint. They must also be interpreted in the light of more remote history. The framers of those clauses did not invent the conception of freedom of speech as a result of their own experience of the last few years. The idea had been gradually molded in men's minds by centuries of conflict. It was the product of a people of whom the framers were merely the mouthpiece. Its significance was not fixed by their personality, but was the endless expression of a civilization.[71] It was formed out of past resentment against the royal control of the press under the Tudors, against the Star Chamber and the pillory, against the Parliamentary censorship which Milton condemned in his "Areopagitica," by recollections of heavy newspaper taxation, by hatred of the suppression of thought which went on vigorously on the Continent during the eighteenth century. Blackstone's views also had undoubted influence to bar out previous restraint. The censor is the most dangerous of all the enemies of liberty of the press, and cannot exist in this country unless made necessary by extraordinary perils.

Moreover, the meaning of the First Amendment did not crystallize in 1791. The framers would probably have been horrified at the thought of protecting books by Darwin or Bernard Shaw, but

[70] Act of December 26, 1785, 12 HENING'S STATUTES AT LARGE OF VIRGINIA (1823), c. 34, page 84. 1 REVISED CODE OF VIRGINIA (1803), c. 20, page 29.

Another excellent argument against the punishment of tendencies is found in PHILIP FURNEAUX, LETTERS TO BLACKSTONE, 2 ed., 60–63, London, 1771; quoted in State *v.* Chandler, 2 Harr. (Del.) 553, 576 (1837), and in part by Schofield, *op. cit.*, 77.

[71] 1 KOHLER, LEHRBUCH DES BURGERLICHEN RECHTS, § 38.

"liberty of speech" is no more confined to the speech they thought permissible than "commerce" in another clause is limited to the sailing vessels and horse-drawn vehicles of 1787. Into the making of the constitutional conception of free speech have gone, not only men's bitter experience of the censorship and sedition prosecutions before 1791, but also the subsequent development of the law of fair comment in civil defamation,[72] and the philosophical speculations of John Stuart Mill. Justice Holmes phrases the thought with even more than his habitual felicity.[73] "The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil."

It is now clear that the First Amendment fixes limits upon the power of Congress to restrict speech either by a censorship or by a criminal statute, and if the Espionage Act exceeds those limits it is unconstitutional. It is sometimes argued that the Constitution gives Congress the power to declare war, raise armies, and support a navy, that one provision of the Constitution cannot be used to break down another provision, and consequently freedom of speech cannot be invoked to break down the war power.[74] I would reply that the First Amendment is just as much a part of the Constitution as the war clauses, and that it is equally accurate to say that the war clauses cannot be invoked to break down freedom of speech. The truth is that all provisions of the Constitution must be construed together so as to limit each other. In war as in peace, this process of mutual adjustment must include the Bill of Rights. There are those who believe that the Bill of Rights can be set aside in war time at the uncontrolled will of the government.[75] The first ten amendments were drafted by men who had just been through a war. Two of these amendments expressly apply in war.[76] A majority of the Supreme Court declared the war power of Congress to

[72] Schofield, *op. cit.*, is valuable on the relation of fair comment to free speech. See also Van Vechten Veeder, "Freedom of Public Discussion," 23 HARV. L. REV. 413 (1910).

[73] Gompers *v.* United States, 233 U. S. 604, 610 (1914).

[74] United States *v.* Marie Equi, BULL. DEPT. JUST., No. 172, 21 (Ore., 1918), Bean, J.

[75] Henry J. Fletcher, "The Civilian and the War Power," 2 MINN. L. REV. 110, expresses this view. See also Ambrose Tighe, "The Legal Theory of the Minnesota 'Safety Commission' Act," 3 MINN. L. REV. 1.

[76] Amendments III and V.

be restricted by the Bill of Rights in *Ex parte Milligan*,[77] which cannot be lightly brushed aside, whether or not the majority went too far in thinking that the Fifth Amendment would have prevented Congress from exercising the war power under the particular circumstances of that case. If the First Amendment is to mean anything, it must restrict powers which are expressly granted by the Constitution to Congress, since Congress has no other powers.[78] It must apply to those activities of government which are most liable to interfere with free discussion, namely, the postal service and the conduct of war.

The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion, for, as Bagehot [79] points out, once force is thrown into the argument, it becomes a matter of chance whether it is thrown on the false side or the true, and truth loses all its natural advantage in the contest. Nevertheless, there are other purposes of government, such as order, the training of the young, protection against external aggres-

[77] 4 Wall. (U. S.) 2 (1866). The judges all agreed that Congress had not authorized the trial of the petitioner by a military tribunal. The majority, per Davis, J., took the ground that the government cannot have recourse to extraordinary procedure until there are extraordinary conditions to justify it and that under the Bill of Rights the decision of Congress that such procedure is necessary can be reviewed by the courts. The minority, per Chase, C. J., declared that Congress is sole judge of the expediency of military measures in war time, and that the war power is not abridged by any Amendment. The majority view on this matter may be accepted by one who questions their opinion that military tribunals are never justified outside the theater of active military operations in a place where the civil courts are open. It may be that military tribunals are necessary where the machinery of the civil courts cannot adequately meet the situation (3 MINN. L. REV. 9), but the civil courts must eventually decide whether their machinery was adequate or not. Otherwise, in any war, no matter how small or how distant, Congress could put the whole country under military dictatorship.

[78] UNITED STATES CONSTITUTION, Art. I, § 1. "All legislative powers herein granted shall be vested in a Congress." Amendment X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

"This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent." Marshall, C. J., in McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 405 (1819). See also Taney, C. J., in *Ex parte* Merryman, Taney, 246, 260 (1861), and Brewer, J., in Kansas *v.* Colorado, 206 U. S. 46, 81 (1907).

[79] "The Metaphysics of Toleration," in his LITERARY ESSAYS, Silver Library edition, II, 208 (Longmans).

sion. Unlimited discussion sometimes interferes with these purposes, which must then be balanced against freedom of speech, but freedom of speech ought to weigh very heavily in the scale. The First Amendment gives binding force to this principle of political wisdom.[80]

Or to put the matter another way, it is useless to define free speech by talk about rights. The agitator asserts his constitutional right to speak, the government asserts its constitutional right to wage war. The result is a deadlock. Each side takes the position of the man who was arrested for swinging his arms and hitting another in the nose, and asked the judge if he did not have a right to swing his arms in a free country. "Your right to swing your arms ends just where the other man's nose begins." To find the boundary line of any right, we must get behind rules of law to human facts. In our problem, we must regard the desires and needs of the individual human being who wants to speak and those of the great group of human beings among whom he speaks. That is, in technical language, there are individual interests and social interests, which must be balanced against each other, if they conflict, in order to determine which interest shall be sacrificed under the circumstances and which shall be protected and become the foundation of a legal right.[81] It must never be forgotten that the balancing cannot be properly done unless all the interests involved are adequately ascertained, and the great evil of all this talk about rights is that each side is so busy denying the other's claim to rights that it entirely overlooks the human desires and needs behind that claim.

The rights and powers of the Constitution, aside from the portions which create the machinery of the federal system, are largely means of protecting important individual and social interests, and because of this necessity of balancing such interests the clauses cannot be construed with absolute literalness. The Fourteenth Amendment and the obligation of contracts clause, maintaining important individual interests, are modified by the police power of the states, which protects health and other social interests. The Thirteenth Amendment is subject to many implied exceptions, so that tem-

[80] This paragraph and a portion of the preceding have already been printed in 17 NEW REPUBLIC, 67.

[81] This distinction between rights and interests clarifies almost any constitutional controversy. The distinction originated with Von Ihering. For a presentation of it in English, see JOHN CHIPMAN GRAY, NATURE AND SOURCES OF THE LAW, § 48 ff.

porary involuntary servitude is permitted to secure social interests in the construction of roads,[82] the prevention of vagrancy, the training of the militia or national army. It is common to rest these implied exceptions to the Bill of Rights upon the ground that they existed in 1791 and long before,[83] but a less arbitrary explanation is desirable. It seems better to say that long usage does not create an exception, but demonstrates the importance of the social interest behind the exception.[84]

The First Amendment protects two kinds of interests in free speech.[85] There is an individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way. This social interest is especially important in war time. Even after war has been declared there is bound to be a confused mixture of good and bad arguments in its support, and a wide difference of opinion as to its objects. Truth can be sifted out from falsehood only if the government is vigorously and constantly cross-examined, so that the fundamental issues of the struggle may be clearly defined, and the war may not be diverted to improper ends, or conducted with an undue sacrifice of life and liberty, or prolonged after its just purposes are accomplished. Legal proceedings prove that an opponent makes the best cross-examiner. Consequently it is a disastrous mistake to limit criticism to those who favor the war.[86] Men bitterly hostile to it may point

[82] Butler *v.* Perry, 240 U. S. 328 (1916).

[83] Robertson *v.* Baldwin, 165 U. S. 275, 281 (1897).

[84] Not everything old is good. Thus the antiquity of peonage does not constitute it an exception to the Thirteenth Amendment; it is not now demanded by any strong social interest. Bailey *v.* Alabama, 219 U. S. 219 (1911). It is significant that the social interest in shipping which formerly required the compulsory labor of articled sailors (Robertson v. Baldwin, *supra*) is no longer recognized in the United States as sufficiently important to outweigh the individual interest in free locomotion and choice of occupation. Even treaties providing for the apprehension in our ports of deserting foreign seamen have been abrogated by the LaFollette Seamen's Act, Act of March 4, 1915, c. 153, § 16, 38 STAT. AT L. 1184; U. S. COMP. STAT., 1918, § 8382 *a*. For the old social interest in the regulation of laborers' wages, now abrogated by the New York Constitution, see Saratoga *v.* Saratoga Gas, 191 N. Y. 123, 141, 83 N. E. 693 (1908). That the Bill of Rights does not crystallize antiquity, Hurtado *v.* California, 110 U. S. 516 (1884).

[85] See Roscoe Pound, "Interests of Personality," 28 HARV. L. REV. 445, 453–56.

[86] Judge Van Valkenburgh told the jury that it must be so limited in United States *v.* Rose Pastor Stokes, BULL. DEPT. JUST., 106, 14 (W. D. Mo., 1917). See page 966, *infra*.

out evils in its management like the secret treaties, which its supporters have been too busy to unearth. The history of the last five years shows how the objects of a war may change completely during its progress, and it is well that those objects should be steadily reformulated under the influence of open discussion not only by those who demand a military victory but by pacifists who take a different view of the national welfare. Further argument for the existence of this social interest becomes unnecessary if we recall the national value of the opposition in former wars.

The great trouble with most judicial construction of the Espionage Act is that this social interest has been ignored and free speech has been regarded as merely an individual interest, which must readily give way like other personal desires the moment it interferes with the social interest in national safety. The judge who has done most to bring social interests into legal thinking said years ago, "I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate and often unconscious."[87] The failure of the courts in the past to formulate any principle for drawing a boundary line around the right of free speech has not only thrown the judges into the difficult questions of the Espionage Act without any well-considered standard of criminality, but has allowed some of them to impose standards of their own and fix the line at a point which makes all opposition to this or any future war impossible. For example:

> "No man should be permitted, by deliberate act, or even unthinkingly, to do that which will in any way detract from the efforts which the United States is putting forth or serve to postpone for a single moment the early coming of the day when the success of our arms shall be a fact."[88]

The true boundary line of the First Amendment can be fixed only when Congress and the courts realize that the principle on which speech is classified as lawful or unlawful involves the balancing

[87] Oliver Wendell Holmes, "The Path of the Law," 10 HARV. L. REV. 457, 467.

[88] United States *v.* "The Spirit of '76," BULL. DEPT. JUST., No. 33, 2 (S. D. Cal., 1917), Bledsoe, J. Another good example is United States *v.* Schoberg, BULL. DEPT. JUST., No. 149 (E. D. Ky., 1918), Cochran, J.

against each other of two very important social interests, in public safety and in the search for truth. Every reasonable attempt should be made to maintain both interests unimpaired, and the great interest in free speech should be sacrificed only when the interest in public safety is really imperiled, and not, as most men believe, when it is barely conceivable that it may be slightly affected. In war time, therefore, speech should be unrestricted by the censorship or by punishment, unless it is clearly liable to cause direct and dangerous interference with the conduct of the war.

Thus our problem of locating the boundary line of free speech is solved. It is fixed close to the point where words will give rise to unlawful acts. We cannot define the right of free speech with the precision of the Rule against Perpetuities or the Rule in Shelley's Case, because it involves national policies which are much more flexible than private property, but we can establish a workable principle of classification in this method of balancing and this broad test of certain danger. There is a similar balancing in the determination of what is "due process of law." And we can with certitude declare that the First Amendment forbids the punishment of words merely for their injurious tendencies. The history of the Amendment and the political function of free speech corroborate each other and make this conclusion plain.

The Espionage Act of 1917 seems on its face constitutional under this interpretation of the First Amendment, but it may have been construed so extremely as to violate the Amendment. Furthermore, freedom of speech is not only a limit on Congressional power, but a policy to be observed by the courts in applying constitutional statutes to utterance. The scope of that policy is determined by this same method of balancing social interests. The boundary line of punishable speech under this Act was consequently fixed where words come close to injurious conduct by the judge who has given the fullest attention to the meaning of free speech during the war, — Judge Learned Hand, of the Southern District of New York.

In *Masses Publishing Co. v. Patten* [89] Judge Hand was asked to enjoin the postmaster of New York from excluding from the mails *The Masses*, a monthly revolutionary journal, which contained several articles, poems, and cartoons attacking the war. The

[89] 244 Fed. 535 (S. D. N. Y., 1917).

Espionage Act of 1917 [90] made non-mailable any publication which violated the criminal provisions of that act,[91] already summarized in this article.[92] One important issue was, therefore, whether the postmaster was right in finding such a violation. The case did not raise the constitutional question whether Congress could make criminal any matter which tended to discourage the successful prosecution of the war, but involved only the construction of the statute, whether Congress had as yet gone so far. Judge Hand held that it had not and granted the injunction. He refused to turn the original Act, which obviously dealt only with interference with the conduct of military affairs,[93] into a prohibition of all kinds of propaganda and a means for suppressing all hostile criticism and all opinion except that which encouraged and supported the existing policies of the war, or fell within the range of temperate argument. As Cooley pointed out long ago, you cannot limit free speech to polite criticism, because the greater a grievance the more likely men are to get excited about it, and the more urgent the need of hearing what they have to say.[94] The normal test for the suppression of speech in a democratic government, Judge Hand insists, is neither the justice of its substance nor the decency and propriety of its temper, but the strong danger that it will cause injurious acts.

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[90] Act of June 15, 1917, c. 30, Title XII, § 2, 40 STAT. AT L. 230, U. S. COMP. STAT., 1918. § 10401 *a*.

[91] Act of June 15, 1917, c. 30, Title I, § 3, 40 STAT. AT L. 219, U. S. COMP. STAT., 1917, § 10212*c*: "Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct or attempt to obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."

[92] Page 935, *supra*.

[93] Masses Publishing Co. *v.* Patten, *supra*, 539. The plain fact that the original Espionage Act is a military statute and not a sedition statute is also recognized by United States *v.* Fontana, BULL. DEPT. JUST., No. 148 (N. D. 1917), Amidon, J.; United States *v.* Wishek, BULL. DEPT. JUST., No. 153 (N. D., 1917), Amidon, J.; United States *v.* Henning, BULL. DEPT. JUST., No. 184 (Wis., 1917), Geiger, D. J.; and implied by other cases. The large number of cases which ignore the clear meaning of the statute is astounding in view of the rule that criminal statutes must be construed strictly.

[94] COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 613.

The Espionage Act should not be construed to reverse this national policy of liberty of the press and silence hostile criticism, unless Congress has given the clearest expression of such an intention in the statute.

Judge Hand places outside the limits of free speech one who counsels or advises others to violate existing laws. It is true, he says, that any discussion designed to show that existing laws are mistaken in means or unjust in policy may result in their violation,[95] but if one stops short of urging upon others that it is their duty or their interest to resist the law, he should not be held to have attempted to cause illegal conduct. If this is not the test, the 1917 Act punishes every political agitation which can be shown to be apt to create a seditious temper. The language of the statute proves that Congress had no such revolutionary purpose in view.

There is no finer judicial statement of the right of free speech than these words of Judge Hand:

"Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them in execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom."[96]

Look at the Espionage Act of 1917[97] with a post-armistice mind, and it is clear that Judge Hand was right. There is not a word in it to make criminal the expression of pacifist or pro-German opinions. It punishes false statements and reports — necessarily limited to statements of fact — but beyond that does not contain even a provision against the use of language. Clauses (2) and (3) punish successful interference with military affairs and attempts to interfere, which would probably include incitement.[98] The tests

[95] He expresses this idea both in Masses Publishing Co. *v.* Patten, *supra*, and in United States *v.* Scott Nearing, 252 Fed. 223, BULL. DEPT. JUST., No. 129 (S. D. N. Y., 1918).

[96] Masses Pub. Co. *v.* Patten, 244 Fed. 535, 540 (1917).

[97] See note 91, *supra*, for text of the act.

[98] Attempts do not ordinarily include solicitation, see Beale, *infra*, 16 HARV. L.

of criminal attempt and incitement are well settled.[99] The first requirement is the intention to bring about the overt criminal act. But the law does not punish bad intention alone, or even everything done with a bad intention. A statute against murder will not be construed to apply to discharging a gun with the intention to kill a man forty miles away.[100] Attempts and incitement to be punishable must come dangerously near success. A speaker is guilty of solicitation or incitement to a crime only if he would have been indictable for the crime itself, had it been committed, either as accessory or principal.[101] Consequently, no one should have been held under clauses (2) and (3) of the Espionage Act of 1917 who did not satisfy these tests of criminal attempt and incitement. As Justice Holmes said in *Commonwealth* v. *Peaslee*,[102] "It is a question of degree." We can suppose a series of opinions, ranging from "This is an unwise war" up to "You ought to refuse to go, no matter what they do to you," or an audience varying from an old women's home to a group of drafted men just starting for a training-camp. Somewhere in such a range of circumstances is the point where direct causation begins and speech becomes punishable as incitement under the ordinary standards of statutory construction and the ordinary policy of free speech, which Judge Hand applied. Congress could push the test of criminality back beyond this point, although eventually it would reach the extreme limit fixed by the First Amendment, beyond which words cannot be restricted for their remote tendency to hinder the war. In other words, the ordinary tests punish agitation just before it begins to boil over; Congress could change those tests and punish it when it gets really hot, but it is unconstitutional to interfere when it is merely warm. And there is not a word in the 1917 Espionage Act to show that Congress did change the ordinary tests or make any speech criminal except false statements and incitement to overt acts. Every word used, "cause,"

REV. 491, 506, note 1; but attempts to commit offences under the 1917 Espionage Act would naturally be by incitement.

[99] Joseph H. Beale, "Criminal Attempts," 16 HARV. L. REV. 491; Commonwealth *v.* Peaslee, 177 Mass. 267, 59 N. E. 55 (1901), Holmes, C. J.; United States *v.* Stephens 12 Fed. 52 (Ore. 1882), Deady, D. J. See also 32 HARV. L. REV. 417.

[100] United States *v.* Stephens, *supra*, illustrates the same principle.

[101] See Beale, *supra*, 16 HARV. L. REV. 491, 505. Under the federal statutes he would be a principal. REV. STAT. §§ 5323, 5427, March 4, 1909, c. 321 § 332; 35 STAT. AT L. 1152; U. S. COMP. STAT. 1918, § 10506 (Crim. Code, § 332).

[102] 177 Mass. 267, 272, 59 N. E. 55 (1901).

"attempt," "obstruct," clearly involves proximate causation. Finally, this is a penal statute and ought to be construed strictly. Attorney General Gregory's charge that judges like Learned Hand "took the teeth" out of the 1917 Act [103] is absurd, for the teeth the government wanted were never there until other judges in an excess of patriotism put in false ones.

Nevertheless, Judge Hand was reversed,[104] largely on a point of administrative law,[105] but the Circuit Court of Appeals thought it desirable to reject his construction of the Espionage Act and substitute the view that speech is punishable under the Act "if the natural and reasonable effect of what is said is to encourage resistance to law, and the words are used in an endeavor to persuade to resistance." [106] It is possible that the Court of Appeals did not intend to lay down a very different principle from Judge Hand, but chiefly wished to insist that in determining whether there is incitement one must look not only at the words themselves but also at the surrounding circumstances which may have given the words a special meaning to their hearers. Mark Antony's funeral oration, for instance, counselled violence while it expressly discountenanced it.[107] However, the undoubted effect of the final decision in *Masses* v. *Patten* was to establish the old-time doctrine of indirect causation in the minds of district judges throughout the country. By its rejection of the common-law test of incitement,[108] it deprived us of the only standard of criminal speech there was, since there had been no well-considered discussion of the meaning of free speech in the First Amendment. It allowed conviction for words which had an indirect effect to discourage recruiting, if the intention to discourage existed,[109] and this requirement of intention became a mere form since it could

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[103] See page 936, *supra*.

[104] Masses Pub. Co. *v.* Patten, 245 Fed. 102 (C. C. A. 2d, 1917), Hough, J., stayed the injunction; *ibid.*, 246 Fed. 24 (C. C. A. 2d, 1917), Ward, Rogers, and Mayer, JJ., reversed the order granting the injunction.

[105] That the postmaster's decision must stand unless clearly wrong. See for authorities against this proposition, 32 HARV. L. REV. 417, 420.

[106] Masses *v.* Patten, 246 Fed. 24, 38, Rogers, J.

[107] See the review of Masses *v.* Patten by Learned Hand, J., in United States *v.* Nearing, 252 Fed. 223, 227 (S. D. N. Y., 1918).

[108] *Ibid.* Judge Rogers may not have realized he was rejecting it (246 Fed. 38), but the test of common-law incitement has never been applied to the Act by a District Judge since.

[109] Masses Pub. Co. *v.* Patten, 246 Fed. 24, 39 (1917), Ward, J.

be inferred from the existence of the indirect effect.[110] A few judges, notably Amidon of North Dakota,[111] have stemmed the tide, but of most Espionage Act decisions what Schofield and Stephen and Jefferson said about the prosecutions under George III and the Sedition Act of 1798 can be said once more, that men have been punished without overt acts, with only a presumed intention to cause overt acts, merely for the utterance of words which judge and jury thought to have a tendency to injure the state. Judge Rogers was right in saying[112] that the words of the Espionage Act of 1917 bear slight resemblance to the Sedition Law of 1798, but the judicial construction is much the same, except that under the Sedition Law truth was a defense.

The revival of the doctrines of indirect causation and constructive intent always puts an end to genuine discussion of public matters. It is unnecessary to review the Espionage Act decisions in detail,[113] but a few general results may be presented here. The courts have treated opinions as statements of fact and then condemned them as false because they differed from the President's speech or the resolution of Congress declaring war. They have made it impossible for an opponent of the war to write an article or even a letter in a newspaper of general circulation because it will be read in some training camp where it might cause insubordination or interfere with military success. He cannot address a large audience because it is liable to include a few men in uniform; and some judges have held him punishable if it contains men between eighteen and forty-five; while Judge Van Valkenburgh, in *United States* v. *Rose Pastor Stokes*,[114] would not even require that, because what is said to mothers, sisters, and sweethearts may lessen their enthusiasm for the war, and "our armies in the field and our navies upon the seas can operate and succeed only so far as they are supported and maintained by the folks at home." The doctrine of indirect causation never had

[110] Masses Pub. Co. *v.* Patten, 246 Fed. 24, 39 (1917), Roger, J.: "The court does not hesitate to say that, considering the natural and reasonable effect of the publication, it was intended willfully to obstruct recruiting."

[111] See in particular his discussion of "stirring up class against class," in United States *v.* Brinton, BULL. DEPT. JUST. No. 132 (N. D., 1917).

[112] Masses Pub. Co. *v.* Patten, 246 Fed. 24, 29 (1917).

[113] Detailed comment will be found in WALTER NELLES, ESPIONAGE ACT CASES, and in 32 HARV. L. REV. 417.

[114] BULL. DEPT. JUST., No. 106, p. 4 (W. D. Mo., 1917).

better illustration than in his charge. Furthermore, although Mrs. Stokes was indicted only for writing a letter, the judge admitted her speeches to show her intent, and then denounced the opinions expressed in those speeches in the strongest language [115] to the jury as destructive of the nation's welfare, so that she may very well have been convicted for the speeches and not for the letter. His decision makes it practically impossible to discuss profiteering, because of "the possible, if not probable effect" [116] on our troops, while a recent case in the Second Circuit [117] makes it equally perilous to urge a wider exemption for conscientious objectors because this tends to encourage more such objectors, a close parallel to the English imprisonment of Bertrand Russell.[118] Many men have been imprisoned for arguments or profanity used in the heat of private altercation, and even unexpressed thoughts have been prosecuted through an ingenious method of inquisition.[119] And although we are not at war with Russia, three men who opposed our intervention and compared our troops to the Hessians were condemned by Judge Clayton to imprisonment for twenty years. Judge Van Valkenburgh summed up the facts with appalling correctness in view of the long sentences imposed under the Espionage Act, when he said that freedom of speech means the protection of "criticism which is made friendly to the government, friendly to the war, friendly to the policies of the government." [120]

The United States Supreme Court did not have an opportunity to consider the Espionage Act until 1919, after the armistice was

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[115] BULL. DEPT. JUST., No. 106, p. 4 (W. D. Mo. 1917), *passim*, making use of Mrs. Stokes' declared sympathy with the Russian Revolution, an offense not punishable even under the 1917 Espionage Act, to show how dangerous it was for her to talk about profiteers. His vigorous denunciation of that Revolution, totally unconnected with the indictment, recalls Lord Kenyon's similar use of the massacres of the French Revolution in Rex *v.* Cuthell, 27 How. St. Tr. 642, 674 (1799). Utterances not covered by the indictment were also admitted in Doe *v.* United States, 253 Fed. 903 (C. C. A. 8th, 1918).

[116] United States *v.* Rose Pastor Stokes, *supra*, p. 8.

[117] Fraina *v.* United States, 255 Fed. 28 (C. C. A. 2d, 1918).

[118] Rex *v.* Bertrand Russell, LITTELL'S LIVING AGE, Feb. 15, 1919, p. 385.

[119] United States *v.* Pape, 253 Fed. 270 (1918). A German-American who had not subscribed to Liberty bonds was visited in his house by a committee who asked his reasons and received a courteous reply that he did not wish either side to win the war and could not conscientiously give it his aid. He was thereupon arrested and held in confinement until released by a district court.

[120] United States *v.* Rose Pastor Stokes, *supra*, p. 14. At least twelve persons have been sentenced for ten years, five for fifteen years, and twenty-one for twenty years.

signed and almost all the District Court cases had been tried. Several appeals from conviction had resulted in a confession of error by the government,[121] but at last four cases were heard and decided against the accused. Of these three were clear cases of incitement to resist the draft,[122] so that no real question of free speech arose. Nevertheless the defense of constitutionality was raised, and denied by Justice Holmes. His fullest discussion is in *Schenck* v. *United States*:[123]

"We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . *The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.* It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."

This portion of the opinion, especially the italicized sentence, substantially agrees with the conclusion reached by Judge Hand, by Schofield, and by investigation of the history and political purpose of the First Amendment. It is unfortunate that "the substantive evils" are not more specifically defined, but if they mean overt acts of interference with the war, then Justice Holmes draws the boundary line very close to the test of incitement at common law and clearly makes the punishment of words for their bad tendency impossible. Moreover, the close relation between free speech and criminal attempts is recognized by the use of a phrase employed by the Justice in an attempt case, *Commonwealth* v. *Peaslee*.[124]

If the Supreme Court had applied this same standard of "clear and present danger" to the utterances of Eugene V. Debs, in the remaining decision,[125] it is hard to see how he could have been held

[121] 32 HARV. L. REV. 420, note 22.

[122] Sugarman *v.* United States, 249 U. S. 130, 39 Sup. Ct. Rep. 191 (1919); Schenck *v.* United States, 249 U. S. 47, 39 Sup. Ct. Rep. 247 (1919); Frohwerk *v.* United States, 249 U. S. 204, 39 Sup. Ct. Rep. 249 (1919).

[123] 249 U. S. 47, 39 Sup. Ct. Rep. 247, 249. The italics are mine.

[124] 177 Mass. 267, 272, 59 N. E. 55 (1901). See 963, *supra*.

[125] Debs *v.* United States, 39 Sup. Ct. Rep. 252 (1919).

guilty. The test is not mentioned, however, but Justice Holmes is willing to accept the verdict as proof that actual interference with the war was intended and was the proximate effect of the words used. The point is that Judge Westenhaver did not instruct the jury according to the Supreme Court test at all, but allowed Debs to be found guilty, in Justice Holmes's words, because of the "natural *tendency* and reasonably probable effect" of his speech,[126] and gave a fairly wide scope to the doctrines of indirect causation [127] and constructive intent,[128] so that the defendant could have been and probably was[129] convicted, merely because the jury thought his speech had a tendency to bring about resistance to the draft. If the Supreme Court test is to mean anything more than a passing observation, it must be used to upset convictions for words when the trial judge did not insist that they must create "a clear and present danger" of overt acts.

Justice Holmes seems to discuss the constitutionality of the Espionage Act of 1917 rather than its construction. There can be little doubt that it is constitutional under any test if construed naturally, but it has been interpreted in such a way as to violate the free speech clause and the plain words of the statute, to say nothing of the principle that criminal statutes should be construed strictly. If the Supreme Court test had been laid down in the summer of 1917 and followed in charges by the District Courts, the most casual perusal of the utterances prosecuted makes it sure that there would have been many more acquittals. Instead, bad tendency has been the test of criminality, a test which this article has endeavored to prove wholly inconsistent with freedom of speech, or any genuine discussion of public affairs.

Furthermore, it is regrettable that Justice Holmes did nothing to emphasize the social interest behind free speech, and show the need of balancing even in war time. The last sentence of the passage

[126] Debs *v.* United States, 249 U. S. 211, 39 Sup. Ct. Rep. 252, 254. The italics are mine.

[127] United States *v.* Debs, BULL. DEPT. JUST., No. 155 (N. D. Oh., 1918). See especially the last paragraphs on page 8.

[128] *Ibid.*, 15: "In deciding what the defendant's intention was, permit me to suggest to you these questions: Ought he not to have reasonably foreseen that the natural and probable consequences of such words and utterances would or *might* be to cause insubordination, etc.?"

[129] Ernst Freund, "The Debs Case and Freedom of Speech," 19 NEW REPUBLIC, 13 (May 3, 1919); and the correspondence in 19 *ibid.* 151 (May 31, 1919).

quoted from the Schenck case seems to mean that the Supreme Court will sanction any restriction of speech that has military force behind it, and reminds us that the Justice used to say when he was young, "that truth was the majority vote of that nation that could lick all others."[130] His liberalism seems held in abeyance by his belief in the relativity of values. It is not by giving way to force and the majority that truth has been won. Hard it may be for a court to protect those who oppose the cause for which men are dying in France, but others have died in the past for freedom of speech.

Inconclusive as the Supreme Court decisions are in many ways, there are three important facts about them. First, they lay down a good test for future free speech cases, "clear and present danger." Secondly, they involved three clear cases and one case close to the line. They do not justify the construction given the Act of 1917 in *United States* v. *Rose Pastor Stokes*. Finally, they do not touch the constitutionality of the Espionage Act of 1918. That Act came too late to be much discussed judicially in this war, but it applies in all future wars. It goes so far in punishing discussion for supposed bad tendencies without even recognizing truth as a defense that it is probably unconstitutional.[131]

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[130] Oliver Wendell Holmes, "Natural Law," 32 HARV. L. REV. 40 (1918).

[131] For further consideration of the Act of 1918, see Z. Chafee, Jr., "Freedom of Speech," 17 NEW REPUBLIC, 66 (Nov. 16, 1918). Title I, § 3, as amended, reads as follows (Act of May 16, 1918, 40 STAT. AT L., 219, c. 75, § 1, U. S. COMP. STAT. 1918, § 10212*c*):

"Whoever, *when the United States is at war*, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of his enemies, or shall willfully make or convey false reports or false statements, or say or do anything except by way of bona fide and *not disloyal* advice to an investor or investors, with intent to obstruct the sale by the United States of bonds or other securities of the United States or the making of loans by or to the United States; and whoever, when the United States is at war, shall willfully cause, or attempt to cause, or incite or attempt to incite, insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct or attempt to obstruct the recruiting or enlistment service of the United States, and whoever, when the United States is at war, shall willfully utter, print, write, or publish any *disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States, or any language intended to bring the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States into contempt, scorn, contumely, or disrepute*, or shall willfully utter, print,

The federal government has restricted speech in two other ways besides punishment. It has excluded many publications from the mails. This is clearly previous restraint and might seem forbidden by the Blackstonian definition, which, however, is held not to apply to the postal power.[132] This power, like the war power, ought to be subject to the requirements of free speech and due process of law, and there are dicta of the Supreme Court that it is not unlimited.[133] Although the post-office may not be strictly a common carrier,[134] it is in the nature of a public service company. Its functions have been performed by private persons in the past, and probably would be shared by them now if it were not unlawful because of the greater speed possible.[135] According to the political theories of Leon Duguit,[136] the government in furnishing public service must be judged by ordinary standards of public callings. If the United States owned the railroads, it ought not to make unreasonable discrimination among passengers any more than a private railroad corporation, and a similar limitation should apply to the postal power. The congressional restrictions which have been upheld by the courts may be considered as reasonable regulations in view of the nature of the service. Even opposition to the government may be entitled to some consideration by the post-office as by the

write, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies, or shall willfully display the flag of any foreign enemy, or shall willfully by utterance, writing, printing, publication, or language spoken, urge, incite, or advocate any curtailment of production in this country of any thing or things, product or products, necessary or essential to the prosecution of the war in which the United States may be engaged, with intent by such curtailment to cripple or hinder the United States in the prosecution of the war, and whoever shall willfully advocate, teach, defend, or *suggest* the doing of any of the acts or things in this section enumerated, and whoever shall *by word or act support or favor the cause of any country, with which the United States is at war or by word or act oppose the cause of the United States therein*, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."

The italicized words punish language for remote tendencies: *Cf.* the Sedition Act of 1798.

[132] Masses Pub. Co. *v.* Patten, 246 Fed. 24, 27 (1917), Rogers, J. The operation of our postal censorship is shown by William Hard's articles cited in note 1, *supra*.

[133] *Ex Parte* Jackson, 96 U. S. 727 (1877); Public Clearing House *v.* Coyne, 194 U. S. 497, 507 (1904).

[134] Masses Pub. Co. *v.* Patten, 245 Fed. 102, 106 (1917), Hough, J.

[135] Something like this happened when the Western Union Telegraph Co. recently tried to carry "night-letters" by messengers on trains.

[136] See H. J. Laski in 31 HARV. L. REV. 186; and his AUTHORITY IN THE MODERN STATE, p. 378.

judges, who frequently decide against the United States. It is clear that exclusion from the mails practically destroys the circulation of a book or periodical, and makes free speech to that extent impossible. To say, as many courts do, that the agitator is still at liberty to use the express or the telegraph,[137] recalls the remark of the Bourbon princess when the Paris mob shouted for bread, "Why don't they eat cake?"

Still another method of suppression of opinion has been used. Not only have we substantially revived the Sedition Act of 1798, but the Alien Act as well.[138] Aliens have been freely deported [139] under statutes passed during the war,[140] and even naturalized citizens or native American women marrying foreigners are within the reach of this power. A former German subject who was naturalized in 1882 refused in 1917 to contribute to the Red Cross and the Young Men's Christian Association because he would do nothing to injure the country where he was brought up and educated. His naturalization certificate was revoked after thirty-five years on the presumption that his recent conduct showed that he took the oath of renunciation in 1882 with a mental reservation as to the country of his birth. He may therefore be deported as an enemy alien.[141]

This completes the record of the restriction of speech in the United States during the late war, except for several decisions in the state courts which need not be discussed in detail.[142] Although we have not gone so far as Great Britain [143] in disregarding con-

[137] This alternative is even less valuable when the government controls the express and the telegraph. The NEW YORK WORLD was recently denied the opportunity to use the telegraph to distribute a criticism of Mr. Burleson. COLLIER'S WEEKLY, May 17, 1919, p. 16.

[138] See 952, *supra*.

[139] CHARLES RECHT, AMERICAN DEPORTATION AND EXCLUSION LAWS, Boston, League for Democratic Control, 1919.

[140] Act of Feb. 5, 1917, 39 STAT. AT L. c. 29, § 19, p. 889; U. S. COMP. STAT. 1918, § 4289¼ *jj;* Act of Oct. 16, 1918, c. 186.

[141] United States *v.* Wusterbarth, 249 Fed. 908 (N. J., 1918), Haight, J.; see also United States *v.* Darmer, 249 Fed. 989 (W. D. Wash., 1918), Cushman, J.

[142] *State Espionage Acts:* State *v.* Holm, 166 N. W. 181 (Minn., 1918); State *v.* Spartz, 167 N. W. 547 (Minn., 1918); State *v.* Tachin, 106 Atl. 145 (N. J., 1919). *Municipal Ordinance regulating newspapers invalid:* Star *v.* Brush, 170 N. Y. Supp. 987 (1918); 172 N. Y. Supp. 851 (1918). *Libel in war controversy:* Van Lonkhuyzen *v.* Daily News, 195 Mich. 283, 161 N. W. 979 (1917), 170 N. W. 93 (1918). *Expulsion of college student for pacifism:* not reviewed, Samson *v.* Columbia, 101 N. Y. Misc. 146, 167 N. Y. Supp. 202 (1917).

[143] The Defence of the Realm Consolidation Act, 1914, 5 GEO. 5, c. 8, § 1, gives His

stitutional guarantees, we have gone much farther than in any other war, even in the Civil War with the enemy at our gates.[144] Undoubtedly some utterances had to be suppressed. We have passed through a period of danger, and have reasonably supposed the danger to be greater than it actually was, but the prosecutions in Great Britain during a similar period of peril in the French Revolution have not since been regarded with pride. Action in proportion to the emergency was justified, but we have censored and punished speech which was very far from direct and dangerous interference with the conduct of the war. The chief responsibility for this must rest, not upon Congress which was content for a long period with the moderate language of the Espionage Act of 1917, but upon the officials of the Department of Justice and the Post-office, who turned that statute into a drag-net for pacifists, and upon the judges who upheld and approved this distortion of law. It may be questioned, too, how much has actually been gained. Men have been imprisoned, but their words have not ceased to spread.[145] The poetry in the Masses was excluded from the mails only to be given a far wider circulation in two issues of the *Federal Reporter*. The mere publication of Mrs. Stokes' statement in the Kansas City *Star*, "I am for the people and the Government is for the profiteers,"

Majesty in Council power "to issue regulations." A very wide scope is given to this power by the House of Lords in Rex *v.* Halliday, [1917] A. C. 260, Lord Shaw of Dunfermline dissenting. See 31 HARV. L. REV. 296. Regulation 27 of the Orders in Council makes various forms of speech, writing, etc., offenses. Regulation 51 A provides for the seizure of publications on warrant, and Regulation 56 (13) for the punishment of press offenses. See Pulling, Defense of the Realm Manual, revised monthly. These regulations have been construed in Norman *v.* Mathews, 32 T. L. R. 303, 369 (1915); Fox *v.* Spicer, 33 T. L. R. 172 (1917); Rex *v.* Bertrand Russell, *supra*, note 128. The practical effect has been to establish an administrative censorship. H. J. LASKI, AUTHORITY IN THE MODERN STATE, 101.

[144] J. F. RHODES, HISTORY OF THE UNITED STATES, III, 553, IV, 245–253, 267 note, 467, 473, VI, 78, 96. For Lincoln's refusal to allow General Burnside and his subordinates to suppress the Chicago *Times* and other newspapers of Copperhead tendencies in Illinois, Indiana, and Ohio, see also Official Record of the Rebellion, Series II, Vol. V, 723, 741; Series III, Vol. III, 252.

The case of *Ex parte* Vallandigham, 1 Wall. (U. S.) 243 (1863), is sometimes supposed to support the unlimited exercise of the war power to restrict speech. See Ambrose Tighe in 3 MINN. L. REV. 1 (1918). The decision merely holds that the writ of *certiorari* does not lie to a military tribunal. Nothing is said as to the existence of some other remedy such as *habeas corpus*, or an action for false imprisonment. *Ex parte* Vallandigham, 28 Fed. Cas. 874 (1863), lends support to Mr. Tighe. The treatment of Vallandigham is considered illegal by Rhodes, *op. cit.*, IV, 245–52.

[145] *Cf.* a similar experience of the Emperor Tiberius, TACITUS, ANNALS, IV, c. 35.

was considered so dangerous to the morale of the training camps that she was sentenced to ten years in prison, and yet it was repeated by every important newspaper in the country during the trial. There is an unconscious irony in all suppression. It lurks behind Judge Hough's comparison of the Masses to the Beatitudes,[146] and in the words of Lord Justice Scrutton during this struggle against autocracy: "It had been said that a war could not be conducted on the principles of the Sermon on the Mount. It might also be said that a war could not be conducted on the principles of Magna Charta." [147]

Those who gave their lives for freedom would be the last to thank us for throwing aside so lightly the great traditions of our race. Not satisfied to have justice and almost all the people with our cause, we insisted on an artificial unanimity of opinion behind the war. Keen intellectual grasp of the President's aims by the nation at large was very difficult when the opponents of his idealism ranged unchecked while the men who urged greater idealism went to prison. In our efforts to silence those who advocated peace without victory we prevented at the very start that vigorous threshing out of fundamentals which might to-day have saved us from a victory without peace.

Zechariah Chafee, Jr.

CAMBRIDGE, MASS.

[146] Masses Pub. Co. *v.* Patten, 245 Fed. 102, 106 (C. C. A. 2d, 1917).

[147] Ronnfeldt *v.* Phillips, 35 T. L. R. 46 (1918, C. A.).